Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-40
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection and	)	
Competition Act of 1992:	)	
	)	
Rate Regulation	)	MM Docket No. 92-266
	)	
Buy-Through Prohibition	)	MM Docket No. 92-262

Third Order on Reconsideration

Adopted: February 22, 1994 Released: March 30, 1994

By the Commission: Commissioner Barrett issuing a statement.

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INTRODUCTION

1. In recent months, this Commission has taken a number of steps to implement the rate regulation provision of the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act," "Cable Act," or "Act").[1] In May 1993, we issued our Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-266 ("Rate Order" and "First Further Notice"), 8 FCC Rcd 5631 (1993), which: 1) developed a process for identifying those situations where effective competition exists, and rate regulation is thus precluded; 2) established the boundaries between federal responsibilities, on the one hand, and state and local responsibilities, on the other hand; and 3) developed procedural and substantive rules to govern the regulation of basic service tier rates, regulated upper tier rates, equipment rates, and rates for leased access channels. In this Third Order on Reconsideration, we dispose principally of those issues raised on reconsideration of the Rate Order or encountered in our initial implementation of rate regulation that do not relate to the calculation of rates. Specifically, we further clarify the definition of "effective competition" in Section 623(l) of the Act, 47 U.S.C. 543(l); affirm our rules regarding tier buy-through prohibitions; address procedural and jurisdictional issues pertaining to the regulatory process, including certification, basic rate decisions, and refund issues; clarify our rules governing evasions, grandfathering of rate agreements, subscriber bill itemization and advertising of rates; consider remaining issues regarding equipment and installation; and clarify several points with regard to FCC Form 393 (the benchmark calculation form) and FCC Forms 1200 and 1205 (the new calculation forms).[2] Two companion Orders[3] dispose of reconsideration

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] FCC Form 1200: "Setting Maximum Initial Permitted Rates for Regulated Cable Services Pursuant to Rules Adopted February 22, 1994--First Time Filers Form;" FCC Form 1205: "Determining Current Equipment and Installation Rates--Equipment Form."

issues involving calculation of rates, provide special regulatory relief for small systems, adopt additional regulations to govern rate increases, and adopt interim cost-of-service rules. Issues raised on reconsideration of the leased access provisions adopted in the Rate Order[4] will be considered in a future order.

I. COMPETITION ISSUES

2. In considering the legislation that was to become the 1992 Cable Act, Congress noted that "[w]hile cable passes more than 95 percent of U.S. television households, and presently more than 60 percent of households subscribe to cable, cable's competitors service, in the aggregate, fewer than 5 percent of American households."[5] Congress further found that without the presence of other multichannel video programming distributors, a cable system faces no local competition, which results in undue market power for the cable operator as compared to that of consumers and video programmers.[6] Our rate regulations are designed to set "reasonable" rates, which we construe to be rates that would be charged by cable operators subject to effective competition.[7]

A. Definitions and Findings of Effective Competition

3. Under the 1992 Cable Act, rate regulation applies only to cable systems that are not subject to "effective competition" as defined in that Act. 47 U.S.C. § 543(a)(2). Section 623(l)(1) of the Act further provides that "effective competition" exists if one of three tests is met:

> (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
>
> (B) . . . the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50% of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming

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[3] Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, FCC 94-38, adopted February 22, 1994 ("Second Order on Reconsideration"); Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 93-215, FCC 94-39, adopted February 22, 1994.

[4] Rate Order at 5933-5964.

[5] House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. ("House Report") at 30 (1992).

[6] Pub. L. No. 102-385, § 2(a)(2).

[7] Second Order on Reconsideration, *supra*.

distributors other than the largest multichannel video programming distributor exceeds 15% of the households in the franchise area; or

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.

47 U.S.C. § 543(l)(1).

4. Our First Order on Reconsideration[8] ("First Rates Reconsideration") addressed issues concerning the first of these statutory tests (*i.e.*, the "low penetration" systems listed in Section 623(l)(1)(A)) and procedures for demonstrating the presence of "effective competition" as defined by the Act. We here consider several remaining issues, most of which involve situations arising under the second statutory test, in which a second cable operator, or other multichannel video provider, actually competes with the subject cable operator.

5. Measurement of Subscribership. As stated above, under the second statutory test, a cable operator is not subject to rate regulation if a competing multichannel distributor serves at least 50% of the households in the subject system's franchise area and more than 15% of the subscribers in the franchise area subscribe to the competitive service (or services). 47 U.S.C. § 543(l)(1)(B). We previously adopted various rules to implement this test. One of these rules provides that, in calculating whether 15% or more of the households in a franchise area subscribe to all but the largest multichannel video programming distributor, we shall consider the subscribership of competing multichannel distributors on a cumulative basis. However, only the subscribers of those multichannel distributors that offer programming to at least 50 percent of the households in the franchise area shall be included in this cumulative measurement. 47 C.F.R. § 76.905(f); Rate Order, *supra* at 5665.

6. Time Warner argues that the statute does not allow us to include only those multichannel distributors that offer programming to at least 50% of the households in the franchise area. It contends that the two tests in subsections 543(l)(1)(B)(i) and (ii) may be met independently, *i.e.*, that all competitors' subscribers should be counted, however small their areas of service, if any competitor reaches 50% of the households in the franchise area. Time Warner also argues that its interpretation addresses the Commission's concern with eliminating rate regulation when only "select portions of a franchise area might receive a choice of several multichannel video programming distributors, while the remainder of the franchise area is left without such alternatives." See Rate Order, *supra* at 5663. It contends that the 50% reach requirement assures the presence of a competitive alternative for most of the franchisee's customers.

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[8] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, FCC 93-428 (released Aug. 27, 1993), 58 Fed. Reg. 46,718 (Sept. 2, 1993).

7. Time Warner has not persuaded us to change our interpretation. As we stated in the Rate Order, we interpret Section 623(l)(1)(B) as providing that effective competition exists only where competitive multichannel service is a viable alternative in a significant portion of the franchise area at issue. Id. at 5665. This interpretation ensures that a cable operator is not subject to rate regulation where a substantial number of subscribers have alternative competitive choices, so that the remaining subscribers have the benefit of the price discipline imposed by the cable operator's need to meet competition in a significant portion of its market. The contrary interpretation advanced by Time Warner would permit a cable company to escape rate regulation even if it faced only a single, ineffective competitor in a majority of its territory, along with a variety of niche competitors to whom it would not necessarily be compelled to provide a competitive response and to whom few of its customers could turn for a competitive alternative. Moreover, in light of the almost universal "offering" of multichannel satellite service, the Time Warner proposal would make the 15% actual subscribership test the sole determinative factor in almost all situations, rendering Section 623(l)(2)(B)(i) superfluous. Thus, we affirm our original interpretation of the test adopted in the Rate Order.

8. Presumption of Availability -- Satellite-Delivered Services. The second statutory test for effective competition requires, in part, that at least two unaffiliated multichannel distributors each offer comparable programming to at least 50% of the households in a franchise area. 47 U.S.C. § 543(l)(1)(B). We previously concluded that multichannel programming is "offered" if it is both technically available (*i.e.*, it can be delivered to a household with only minimal additional investment by the multichannel distributor) and actually available (*i.e.*, potential subscribers must be aware of its availability from marketing efforts). 47 C.F.R. § 76.905(e). Furthermore, as discussed below, the Rate Order stated that multichannel video programming distribution service received from satellites via satellite master antenna television service ("SMATV") or television receive-only earth station ("TVRO") reception is technically available nationwide in all franchise areas that do not, by regulation, restrict the use of home satellite dishes. Rate Order, *supra* at 5659, 60.

9. Three parties, the National Association of Telecommunications Officers and Advisors (NATOA), King County, and Bellsouth Telecommunications, seek elimination of the presumption that satellite service is available, as a technical matter, on a nationwide basis where the use of satellite dishes is not restricted by, for example, local zoning laws. Noting that SMATV service is available only in buildings with multiple dwelling units, they contend that it is incorrect to presume that SMATV service is available to 50% of the households in all franchise areas because there may not be enough multiple dwelling units in a specific franchise area to account for 50% of its households.

10. These parties appear to misunderstand the analysis set forth in the Rate Order. There is no dispute that multichannel video programming is available throughout the United States from satellite stations (except where there are reception obstacles such as zoning restrictions). Because subscription to satellite service is accomplished alternatively through either SMATV or TVRO facilities, we permitted both to be included toward meeting the 15

percent subscription test, even though SMATV service, taken alone, might not be available to 50% of the households in a franchise area. We clearly recognized that SMATV service is generally available only in multiple dwelling units and were not suggesting, contrary to petitioners' filings, that SMATV service by itself might in some theoretical sense be capable of serving the entire nation. Rather, we concluded, and continue to believe, that satellite service is generally available from one or the other of these complementary sources, and it is reasonable to measure actual acceptance of satellite services in any area by collectively counting both SMATV and TVRO subscribership toward the 15 percent test. The fact that it may be the building owner or the manager or the residents of a building collectively who select SMATV service, rather than individual households, does not mean that households in multiple dwelling units do not have a competitive option to cable service. Moreover, where satellite-delivered services achieve a penetration rate of 15%, or are sufficient to contribute meaningfully to a 15% overall penetration rate for competitors, the cable operator presumably will respond to that competition with a competitive offering of its own with no less vigor than if that level of competition came from a terrestrially-based medium.

11. Program Comparability. The Rate Order also adopted a rule defining when a competing multichannel distributor is offering "comparable programming" under the second statutory test for effective competition. Id. at 5666, 67. The rule provides that "[i]n order to offer comparable programming . . . a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming." 47 C.F.R. § 76.905(g).

12. NATOA argues that the failure to adopt an earlier Senate version of the second statutory test for effective competition, which was based *inter alia* on the presence of "a sufficient number of local television broadcast signals" in a franchise area,[9] indicates Congress's intent that broadcast stations not be taken into account in determining what constitutes comparable programming. NATOA thus concludes that our definition of "comparable programming" is inconsistent with this legislative intent that broadcast service programming cannot be considered at all when determining the presence of effective competition. There is no specific language in the Conference Report indicating why the Senate version was not adopted, and NATOA is merely speculating as to the meaning of the omission of the Senate language from the final version. Moreover, NATOA's interpretation of the legislative intent is not supported by the plain meaning of subsection (i), which contains no language prohibiting the Commission from taking into account broadcast service programming in determining when competing multichannel distributors are offering "comparable programming." Indeed, we believe that the failure to include such a prohibition in subsection (i) may be more properly interpreted as an intent by Congress to give the Commission flexibility in crafting a definition of "comparable programming." Thus, contrary to NATOA's claim, Congress's apparent decision that over-the-air broadcast signals

[9] Senate Committee on Commerce, Science and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess. ("Senate Report") at 116 (1991).

alone do not constitute "effective competition" does not prohibit us from taking account of broadcast stations delivered by cable.

13. NATOA also contends that a multichannel distributor offering 12 channels of video programming is not offering programming "comparable" to a cable system that provides, for example, 60 channels of programming. It suggests that the Commission should consider a multichannel distributor to be offering programming comparable to a local cable system only if there is a 20% or less difference in the number of channels of nonbroadcast programming offered by the distributors. This argument was specifically rejected in our Rate Order, and NATOA has offered no new argument. (*See* id. at 5666, 67, and n. 126.) While we recognize that a 12-channel video delivery system is not identical to a 60-channel system, we do not believe that actual channel parity is necessary to provide a competitive alternative. In fact, some disparity in the number of channels offered should lead to a greater price difference, which may enhance the choice presented to subscribers. In addition, as we noted in the Rate Order, any definition of "comparable programming" will be complemented by the 15% penetration requirement which will, in effect, measure subscribers' evaluation of the comparability of the program offering.

14. NATOA also questions the Commission's conclusion that our "definition of 'comparability' should ensure alternative service is competitively comparable to a minimum basic tier service that an incumbent cable operator could offer." Rate Order, *supra* at 5666. The petitioner contends that this is too narrow a reading of "comparable programming" or "effective competition" and that these terms should include entities that provide competition to the package of services offered by cable operators, and not just to the basic service tier of the incumbent cable operator. We do not agree. Since there is a wide variety in the number and types of channels that different cable systems offer, we believe that it is reasonable to take into account the minimum basic service tier in determining when competing multichannel distributors are offering programming comparable to that of a local cable system. Such an approach will ensure that competing multichannel distributors have at least the programming characteristics common to all cable systems. Accordingly, we will not change the definition of "comparable programming" adopted in the Rate Order.

15. Seasonal Households and Subscribers. The Rate Order defined the term "households" as follows: "[e]ach separately billed or billable customer will count as a household subscribing to or being offered video programming services. . . ." 47 C.F.R. § 76.905(c). In addition, individual units in multiple dwelling buildings are counted as separate households even though they may not be separately billed. Id.

16. Higgins Lake Cable, Inc., a small cable system operator, reports that its subscribership fluctuates significantly during different seasons of the year, so that it may be a "low penetration system" within the meaning of Section 623(l)(1)(A), 47 U.S.C. 543(l)(1)(A), at some times but not others. It suggests that the Commission define the term "households" to include all dwelling units, whether they are seasonal or not, in determining whether a system is a low penetration system. Higgins Lake believes that such an approach

would relieve operators of administrative burdens in determining the total number of households within their franchise areas that are occupied on a full-time as opposed to a seasonal basis.

17. The term "household" was defined for purposes of the 1990 Census as "all the persons who occupy a housing unit,"[10] while "housing units" was defined to include both occupied and vacant units. Thus, "housing units" reflect the total dwelling units in a community, while a count of "households" reflects only occupied units. As used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial-year vacant units. In any event, to permit an operator to include dwelling units that are empty for a significant portion of the year in determining its penetration rate would eviscerate the validity of this measure as an indicator of the presence of effective competition. People who are not present cannot be presumed to be choosing local competitive alternatives. We believe that the best and most constant indicator of local viewers' choices is represented by the full-time residents of an area. Moreover, it is the full-time residents who are most affected by the determination whether their cable rates are subject to regulation. Consequently, the operator should measure its penetration rate of full-time subscribers as a percentage of full-time households, *i.e.*, by excluding housing units used for seasonal, occasional, or recreational use.[11] No party has demonstrated why this calculation should be a particular administrative burden, and we believe that it should be easily made from readily available information.[12]

B. Geographically Uniform Rate Structure.

18. The 1992 Cable Act requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." 47 U.S.C. § 543(d). In the Rate Order, the Commission concluded that this provision was applicable only to regulated services in

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[10] Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] We will use the U.S. Census Bureau definition for seasonal, recreational, and occasional use:

> These are vacant units used or intended for use only in certain seasonal or for weekend or other occasional use throughout the year. Seasonal units include those used for summer or winter sports or recreation, such as beach cottages and hunting cabins. Seasonal units may also include quarters for such workers as herders and loggers. Interval ownership units, sometimes called shared ownership or time-sharing condominiums, are also included here.

1990 Census of Housing, General Housing Characteristics, Maryland, at B-12.

[12] For example, the U.S. Census Bureau's General Housing Characteristics Report for each state shows the number of units for local jurisdictions and the number of these units that are vacant due to "seasonal, recreational, or occasional use."

regulated markets. Rate Order, *supra* at 5896. The Commission then determined that the provision would be enforced on a franchise area by franchise area basis. Id. Finally, the Commission found that this provision did not prohibit all differences in rates between customers. Cable operators are not necessarily barred from distinguishing between seasonal and full-time subscribers and from offering promotional rates universally but for a limited time. Also, discounts for senior citizens or economically disadvantaged groups may be set. Additionally, nonpredatory bulk discounts to multiple dwelling units (MDUs) are permissible if offered on a uniform basis. Id. at 5897, 98.

19. A number of cable operators petition the Commission to allow negotiation of rates on a building-by-building basis and to clarify that the "competitive necessity" doctrine applies.[13] Booth American, for example, argues that this is necessary to maintain flexibility to compete with multichannel video providers that target particular MDUs. Time Warner asserts that pervasive competition from alternate service providers exists in communities with significant numbers of MDUs, and Comcast fears that the Commission's current approach virtually guarantees a loss in cable's market share, since cable operators are prevented from responding to competitors' individual bids to MDUs.

20. The Cable Act is unequivocal in requiring uniformity of rates within a franchise area. It states:

> A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.[14]

This language does not limit the provision to any particular class or classes of subscribers. In accordance with the statutory mandate, the Rate Order also specifically noted the Commission's concern that bulk discounts not be abused to displace other multichannel video providers from MDUs, which have become important footholds for the establishment of competition to incumbent cable systems. Id. at 5898. As King County points out, cable operators are not prevented from meeting competition -- as long as the same rate structure is

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[13] Application of this doctrine would allow cable operators to offer a rate to a particular customer to meet the rate offered by a competitor. For a discussion of this doctrine in the Title II common carrier context, see, e.g., Memorandum Opinion and Order in CC Docket No. 88-471 (AT&T Communications, Transmittal No. 1215), 4 FCC Rcd 7712 (1988); Report and Order in CC Docket No. 79-246 (Private Line Rate Structure and Volume Discount Practices), 97 FCC 2d 923, 948 (1984).

[14] Communications Act of 1934, as amended, "Communications Act") § 623(d), 47 U.S.C. § 543(d). See Senate Report at 76. It is clear that Congress also intended to prevent a cable operator from charging a price in a particular MDU that is not a commercially viable price. This would not only require the operator's subscribers to subsidize its MDU customers, but would also unfairly eliminate the competitor's opportunity to engage competitively in the same business. Id.

offered to all MDUs in the franchise area. Moreover, cable operators may offer different rates to MDUs of different sizes and may set rates based on the duration of the contract, provided that the operator can demonstrate that its cost savings vary with the size of the building and the duration of the contract, and as long as the same rate is offered to buildings of the same size and contracts of similar duration. Thus, bulk arrangements on a variable basis between MDUs of the same size and contractual duration, though currently allowed by some franchising authorities, are specifically prohibited by the Act.

21. Continental and TCI urge the Commission to grandfather cable operators' existing contracts with MDUs. Continental argues that if these contracts are not grandfathered, cable operators will be forced to breach them, and TCI contends that the rates in these contracts are already at competitive levels and thus need not be regulated.

22. We believe that the elimination of existing contracts would be unnecessarily disruptive to those subscribers receiving discounts, as well as to those cable companies offering the discounts. Thus, contracts between cable operators and MDUs entered into on or before April 1, 1993, in which the contract rate is lower than the permitted regulated rate, may remain in effect until their previously agreed-upon expiration date. To the extent the Rate Order may have been interpreted by private parties to supersede existing contracts, which were accordingly rewritten, the terms of such contracts may be reinstituted without violating Commission rules.

23. King County requests reconsideration of the Commission's decision to limit the geographic uniformity requirement to regulated services in regulated markets. Rate Order at 5896. The Commission reasoned that while Section 623(d) contained no limiting provisions, the general thrust of the Act's rate regulation provisions was to rely more on general legal prohibitions against anticompetitive behavior, and less on cable industry-specific regulation, as markets become more competitive. Id. King County contends that the Commission's interpretation would permit operators to subsidize low rates in one franchise area (or portion thereof) that faces competition by charging excessive rates in a noncompetitive franchise area, and insists that this is exactly what Congress intended to prevent.

24. On reconsideration, we conclude that the uniform rate structure requirements of Section 623(d), 47 U.S.C. § 543(d), should apply in all franchise areas, irrespective of the presence of "effective competition" as defined in the Act. The specific harms that the rate uniformity provision is intended to prevent -- charging different subscribers different rates with no economic justification and unfairly undercutting competitors' prices -- could occur in areas with head-to-head competition or low penetration sufficient to meet the Act's definition of "effective competition." This would not only permit the charging of noncompetitive rates to consumers that are unprotected by either rate regulation or competitive pressure on rates, but also stifle the expansion of existing, especially nascent, competition. As the Senate Report states: "This provision is intended to prevent cable operators from having different rate structures in different parts of one cable franchise ... [and] from dropping the rates in

one portion of a franchise area to undercut a competitor temporarily."[15] The statutory language does not provide, and the Senate Report does not suggest, that the rate uniformity provision should be limited to franchise areas where "effective competition" is absent. For example, if a wireless cable operator served 60% of the homes passed by a cable system in a franchise area and achieved a 30% penetration rate, effective competition would be found. Under our current rule, the cable operator would be free to charge one price where the wireless cable signal reaches and a higher price where it does not. That could result in the subsidization of the cable operator's competitive responses to the wireless cable operator by the 40% of consumers who do not have a choice of competing operators. Accordingly, we will apply the uniform rate structure requirement to all franchise areas, whether or not the cable system is exempted from rate regulation by the "effective competition" provisions of Section 623(b).

II. TIER BUY-THROUGH PROHIBITION

25. The tier buy-through prohibition of the 1992 Cable Act prohibits cable operators from requiring subscribers to purchase a particular service tier, other than the basic service tier, in order to obtain access to video programming offered on a per-channel or per-program basis. 47 U.S.C. § 543(b)(8). An exception is made for cable operators that are not technically capable of complying with this requirement during the next ten years. Id. In a previous decision, we adopted an implementing rule that (1) prohibits discrimination between subscribers of the basic service tier and other subscribers with regard to rates charged for video programming offered on a per-channel or per-program basis; (2) forbids any retiering of channels or services intended to frustrate the purpose of the tier buy-through provision; and (3) defines when cable systems are not technically capable of complying with this requirement. Report and Order in MM Docket No. 92-262 ("Tier Buy-Through Order"), 8 FCC Rcd 2274 (1993); 47 C.F.R. § 76.921.[16] At that time, we also determined that all cable systems are subject to the tier buy-through prohibition and our implementing rules.[17]

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[15] Senate Report at 76. This language also indicates that the term "geographic area" was intended to refer to "franchise area" and not, as King County argues, a broader geographic area. See Rate Order, *supra*, at 5896, where the Commission considered, and rejected, arguments to define "geographic area" more broadly than a franchise area.

[16] This rule was originally adopted as Section 76.900, but was renumbered and modified in the Rate Order, *supra*.

[17] After the release of the Tier Buy-Through Order, the Commission clarified in the Rate Order that the tier buy-through provision of the 1992 Cable Act "only precludes operators from conditioning access to programming offered on a per-channel or per-program basis on purchasing intermediate tiers." Rate Order, *supra* at 5903, n. 435. Therefore, the provision does not prohibit operators from requiring the purchase of an intermediate tier of cable programming services in order to obtain access to another tier of cable programming services. Id. See also 47 C.F.R. § 76.921(a). No petitions for

Id. at note 32.

26. Prime Cable, the operator of a cable system that is not subject to rate regulation because it has a low penetration rate, requests that the Commission reconsider its determination that the tier buy-through prohibition applies to all cable systems, including those subject to rate regulation. Petitioner argues that the placement of the buy-through prohibition within Section 623(b) of the 1992 Cable Act, 47 U.S.C. 543(b), limits the provision's scope to cable systems that are regulated since Section 623(b) generally relates to basic tier regulation. The petitioner contends that if Congress had intended a broader application of the buy-through prohibition, it would have placed the provision in a different section of the statute.

27. After considering the petitioner's arguments, we continue to believe that the tier buy-through provision applies to all cable systems, regardless of whether they are subject to rate regulation. The language of the provision clearly states, without limitation or qualification, that "a cable operator may not require the subscription to any tier other than the basic service tier . . . as a condition of access to video programming offered on a per channel or per program basis." 47 U.S.C. § 543(b)(8). Congress could have easily limited this provision to regulated systems by expressly doing so.

28. This interpretation is necessary to fulfill the purpose of this provision and the general purposes of the 1992 Cable Act. As explained in the legislative history, the purpose of the tier buy-through provision "is to increase the options for consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programs."[18] Other parts of the legislative history indicate that one of the purposes of the Act is to encourage a greater unbundling of programming offerings and greater choice for subscribers.[19] For example, in the context of defining the term "cable programming services," the Senate Report stated that "[t]hrough unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire."[20] Applying the tier buy-through provision to all cable systems will accomplish this purpose more effectively than limiting the provision to cable systems subject to rate regulation. It is not apparent that cable systems exempted from rate regulation, *i.e.*, those facing "effective competition" as defined for this purpose by the statute, are any more likely to provide buy-through capability of their own volition than those whose rates are regulated. Accordingly, to provide all cable subscribers with the maximum possible flexibility in paying for those programs they desire, it is necessary to apply the tier

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reconsideration were filed in the rate proceeding regarding this clarification.

[18] 138 Cong. Rec. S14608 (September 22, 1992) (Statement of Sen. Inouye).

[19] Senate Report at 77.

[20] Id.

buy-through provision to all cable systems.

29. Prime Cable has not set forth convincing arguments for applying the tier buy-through provision only to rate regulated systems. The placement of the tier buy-through provision in Section 623(b) of the Communications Act does not suggest limited applicability. The tier buy-through provision is in a stand-alone paragraph of Section 623(b) that, unlike many of the other paragraphs of that section, does not deal with rate regulation. Senate Report at 77. We have also concluded in this Order that another paragraph of Section 623 that similarly lacks any limiting or qualifying language -- the geographically uniform rate structure provision -- applies to all cable systems. See para. 24, *supra*. Likewise, the provisions regarding negative option billing, also found in Section 623 of the Act, apply to all cable systems without regard to the presence or absence of effective competition. See discussion at para. 127, *infra*.[21] Additionally, like the buy-through provision, the requirement that all "must-carry" channels be included on the basic tier shares the same subsection (623(b)) with the rate regulations, yet the must-carry requirement is also applicable to all cable systems.[22]

30. Prime Cable's reference to a passage in the House Report explaining that the buy-through provision "prohibits cable operators from requiring subscribers to purchase any tier of service other than the regulated basic tier before being permitted to purchase programming offered on a per-channel or per-program basis"[23] is not persuasive. Prime Cable contends that the House Report would not have used the term "regulated" unless the tier buy-through provision was intended to apply only in a rate regulated environment. We believe, however, that the legislative history was using the term descriptively in reference to basic tier service, which in most instances is subject to rate regulation, unlike per-channel or per-program offerings, which are not subject to regulation. We thus do not believe that a single reference to "the regulated basic tier" in the House Report should be read to add a limiting regulatory gloss to the plain language of the tier buy-through provision, which on its face refers to "cable operator" without limitation or qualification as to whether that operator's rates are subject to regulation.

III. PROCEDURAL AND JURISDICTIONAL ISSUES

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[21] The Conference Report indicates Congress's intention that "the language adopted by the conference ensures that cable operators will not be able to charge customers for tier or packages of programming services or equipment that they do not affirmatively request as well as individually-priced programs or channels." House Committee on Energy and Commerce, H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. ("Conference Report") at 65 (1992). This language establishes that Congress did not intend to extend the limitations on rate regulation to the non-rate provisions of Section 623.

[22] 47 C.F.R. § 76.56(d); Report and Order in MM Docket No. 92-256, 8 FCC Rcd 2965, 2974.

[23] House Report at 85 (emphasis added).

A. Certification Process.

31. The 1992 Cable Act provides that primary responsibility for regulation of rates for basic tier service lies with local franchising authorities, and that the Commission will regulate the rates for all other regulated tiers of programming service. 47 U.S.C. § 543(a)(2). All of our procedural rules and policies that implement rate regulation are designed to meet the twin goals of: 1) observing the prerogative and authority of local franchising authorities to determine whether to regulate basic rates and 2) protecting subscribers from excessive cable rates. 47 U.S.C. § 543(b)(1).

32. In the April 1993 Rate Order, the Commission stated that the franchising authority must take the initiative to either regulate rates or seek the Commission's intervention and have us regulate basic tier rates, with the obvious implication that basic tier rates deemed acceptable by local authorities would not be regulated. We stated that we would not seek to regulate basic tier rates unless requested, or unless a franchising authority sought to regulate rates but was prevented from doing so because of a legal or regulatory obstacle. In devising this delineation of responsibilities, we declared that if this regulatory scheme failed to protect subscribers, we would reconsider its efficacy and, if appropriate, adopt another implementation scheme. Id. at 5640.

33. Before a franchising authority may regulate basic tier rates, it must first seek certification of its capability to regulate, adopt appropriate regulations, and then notify the cable operator that its rates are to be regulated. To qualify for certification, the franchising authority must possess the legal authority to adopt, and the personnel to administer, appropriate rate regulations. 47 U.S.C. § 543(a)(3)(B). We provided that where certification is denied or revoked, we would exercise the franchising authority's regulatory jurisdiction until the franchising authority became certified or recertified. Id. at 5677, 5699.

34. On reconsideration, petitioners have challenged four different aspects of the certification process: 1) the Commission's decision not to assume jurisdiction over basic rates where the franchising authority chooses not to seek certification; 2) the Commission's automatic exercise of jurisdiction over basic rates upon denial of a franchising authority's request for certification; 3) the Commission's standards for revocation of certifications; and 4) the Commission's requirement that franchising authorities seeking to have the Commission regulate basic rates show that their franchise fees are insufficient to fund rate regulation at the local level. Each of these topics is taken up individually below.

35. At the outset, however, it is important to reiterate our firm resolve to effectively implement the Act's provisions to protect subscribers from unreasonable cable rates. It appears that many franchising authorities have not yet filed for certification to regulate rates. We believe that franchising authorities (i) are either uninformed (or misinformed) as to the simplicity and implications of seeking certification, (ii) have decided to wait until other franchising authorities have tested the water or shown them the way, or (iii) are awaiting the Commission's decision on reconsideration of the rate regulations before commencing regulation of basic rates. We intend to undertake a robust and widespread educational effort, and also expect that publicity about the regulatory results achieved by those franchising

authorities that are in the forefront of rate regulation will greatly increase the number of authorities seeking certification to regulate rates. Given this expectation, we are reluctant to infringe on local authorities' regulatory prerogatives at this time. However, if our expectations are not promptly borne out, and too many subscribers are deprived of the benefits of the 1992 Cable Act due to inaction by their franchising authorities, we will revisit our stance on any and all of the certification-related issues discussed here.

36. Franchising Authority's Decision Not to Regulate. In the Rate Order, we analyzed carefully whether we should assert the authority to regulate basic rates when a franchising authority had not sought certification. We emphasized that Congress had vested in local franchising authorities the primary authority to regulate basic rates and that we therefore did not want to override a locality's decision not to regulate rates. We concluded that we would not assume jurisdiction in cases where a franchising authority does not apply for certification or directly request that the Commission regulate rates. Rate Order, *supra* at 5676.

37. Bell Atlantic and Bellsouth Telecommunications argue that by declining to regulate basic cable rates where authorities do not regulate these rates themselves, the Commission has created a regulatory "no-man's land" in which basic rates are free of any regulation at all. The petitioners argue that creating such a regulatory vacuum is contrary to a stated purpose of the Act, to ensure that rates for basic service are reasonable. In opposition, Viacom argues that franchising authorities are best able to determine whether to regulate basic service rates.

38. These arguments were squarely before us when we made our determination in the Rate Order and, for the time being, we will continue to decline to assert jurisdiction over basic cable service where franchising authorities do not choose to regulate rates themselves. The Act's regulatory scheme vests in franchising authorities the initial decision whether their communities' basic cable service rates should be regulated. Rate Order, *supra* at 5676. Any regulatory "no-man's land" will be created by the intentional action or inaction of the local franchising authority.[24] In any case where this may work to the detriment of subscribers, they can seek relief from their local authorities through the political processes available to them. However, as noted in paragraph 35, above, in the event that basic cable rates remain unregulated in a large number of communities , we will reexamine this issue.

39. Franchise Fee Rebuttal Showing. We stated in the Rate Order that we would presume that franchising authorities receiving franchise fees have the resources to regulate rates. A franchising authority seeking to have the Commission exercise jurisdiction over basic rates is thus required to rebut this presumption with evidence showing why the proceeds of the franchise fees it obtains cannot be used to cover the cost of rate regulation. Rate Order, *supra* at 5676. This showing must consist of a detailed explanation of the

[24] However, to ensure that there is no absence of regulation solely because franchising authorities lack the resources to regulate, the rules allow franchising authorities to petition the Commission to regulate rates in their community. See discussion at paras. 39-43, *infra*.

franchising authority's regulatory program that shows why funds are insufficient to cover basic rate regulation. Id. The Commission will assume jurisdiction only if it determines that the franchise fees cannot reasonably be expected to cover the present regulatory program and basic rate regulation. Id.

40. NATOA and King County argue that the franchising authorities should not have to justify their inability to regulate rates through a rebuttal showing based on franchise fee inadequacy. They argue that such a requirement would directly contradict Section 622(i) of the Communications Act, 47 U.S.C. 542(i), which prohibits federal agencies from regulating the use of funds derived from franchise fees. NATOA argues that the municipalities may be required to demonstrate that they lack resources to regulate rates, but not through a specific showing related to franchise fees. Rather, NATOA proposes, the showing should consist of a simple certification that the franchising authority does not have the resources to regulate, similar to the certification requirement for franchise authorities wishing to regulate (FCC Form 328). NATOA also points out that, in any event, the rules provide no guidance as to the level of funding that would be considered adequate or the type of showing required. The municipalities also argue that, regardless of the franchising authority's ability to regulate rates, the Cable Act requires the Commission to regulate rates if the franchising authority so elects.

41. We continue to believe that the rebuttal showing requirement is consistent with Section 622(i) of the Communications Act. While the Act provides that the Commission cannot directly control the franchising authority's use of the proceeds from the franchise fees, nothing prevents the Commission from basing a judgment on whether to assume regulation of basic tier rates on whether the franchising authority indeed lacks the funds to do so. The Commission's requirement is not a regulation of "the use of funds derived from such fees" within the meaning of Section 622(i), but is merely a test for determining which regulatory efforts should receive the benefit of the Commission's limited resources, based on the importance placed on that regulation by the respective franchising authority. The emphasis the franchising authority has placed on rate regulation will be demonstrated by whether the franchising authority will expend already available funds raised from the operation of the subject cable system in that effort. Such a requirement also ensures that the Commission expends its resources only where local regulation is most clearly shown not to be a viable alternative. Cf. Grove City College v. Bell, 465 U.S. 555 (1984) (reasonable conditions may attach to federal financial assistance).[25] Finally, we note that some courts have recognized that the purpose of the franchise fee is not only to compensate the franchising authority for the use of the public rights-of-way, but also for the costs of administering the franchise. See, *e.g.*, Telesat Cablevision, Inc. v. the City of Riviera Beach, 773 F. Supp. 383, 406 (S.D.Fla. 1991) (franchise fee constitutional under Cable Act because it related directly to costs of administering franchise as well as rental for rights-of-way); see also Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa.

[25] As stated earlier, however, if rate regulation is widely eschewed by franchising authorities, our entire scheme for achieving regulatory implementation of the rate regulation provisions of the 1992 Cable Act will have to be revisited, and this provision would be included in that reexamination.

1987) (subsequent history omitted) (general flat tax can be tied to administrative or regulatory expenses incurred by governmental entity).

42. As to the specific showing required, the franchising authority would simply have to document the funds it raises from franchise fees and any general taxes, estimate the cost of rate regulation, and provide an explanation as to why the funds are insufficient to cover those costs. Some of these factors may include whether the franchise fee collected is less than five percent of the cable operator's gross revenues,[26] and whether costs may be shared among several municipalities by filing joint certifications. As we gain experience reviewing such requests, which we intend to resolve expeditiously, we will establish standards on a case-by-case basis to determine whether the franchising authority has sufficiently justified its request that the Commission regulate basic cable rates in a particular community.

43. With respect to the municipalities' argument that the Cable Act requires the Commission to regulate rates, regardless of the franchising authority's ability to so regulate, we already addressed this argument in the Rate Order. We stated that Congress envisioned local franchising authorities as the primary regulators of basic service rates under the Act's framework, and that we would not assume jurisdiction at this time where a franchising authority does not apply for certification. Rate Order at 5676.

44. Voluntary Withdrawal of Certification. Under the 1992 Cable Act, once a franchising authority is certified, only the emergence of effective competition nullifies the regulatory jurisdiction of both the authority and the Commission over basic cable rates. Specifically, the Act provides that in franchise areas where the Commission determines that effective competition exists, neither the local franchising authorities nor the Commission has the jurisdiction to regulate rates.[27]

45. On reconsideration of the Rate Order, Baraff, Koerner, Olender & Hochberg, and Booth American Company request that the Commission establish procedures for a franchising authority to voluntarily withdraw its certification to regulate basic rates. They observe that, under the 1992 Cable Act and the Rate Order, franchising authorities can avoid regulatory responsibility for basic cable service by not seeking initial certification from the Commission or by not asserting jurisdiction even after they are certified.[28] They argue that franchising authorities should also be allowed to voluntarily decertify their regulatory authority in the face of operational experience that shows that rate regulation is not in the best interests of the community.

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[26] Section 622(b) of the Communications Act allows franchising authorities to collect franchise fees in an amount up to five percent of a cable operator's gross revenues during any 12-month period. 47 U.S.C. § 542(b).

[27] See Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2). See also Communications Act, § 623(l)(1)(A)-(C), 47 U.S.C. § 543(l)(1)(A)-(C) (defining the term "effective competition").

[28] In either case, the Commission would not assert jurisdiction either by default or by request. See 47 C.F.R. §§ 76.910 and 76.915.

46. Although Congress did not specifically provide for the voluntary decertification of franchising authorities, we believe Congress envisioned that franchising authorities would ultimately decide whether rate regulation is appropriate in their communities. Indeed, the fact that franchising authorities have a choice as to whether to seek certification is part of Congress's scheme to vest primary regulatory responsibility in franchising authorities. Accordingly, we will allow certified franchising authorities to notify the Commission that they have decided not to regulate rates, upon their determination that rate regulation would no longer serve the best interests of local cable subscribers.[29] Franchising authorities are specifically prohibited from accepting consideration in exchange for their decision to decertify.

47. Franchising Authority's Failure to Meet Certification Requirements. In the Rate Order, we stated that we would automatically assume jurisdiction over basic cable rates when a franchising authority seeking initial certification does not have the legal authority to regulate rates or does not have rate regulations that are consistent with those of the Commission. In accordance with the Act, we retain jurisdiction in such cases only until the franchising authority has qualified to exercise jurisdiction by submitting a new certification and meeting the required statutory standard. See 47 U.S.C. § 543(a)(6); 47 C.F.R. § 76.913 (a). We indicated, however, that we would allow the franchising authority to cure any defects in its procedural regulations governing rate proceedings before we would assume jurisdiction. Rate Order, *supra* at 5676, 77; 47 C.F.R. § 76.910.

48. A number of cable operators request that the Commission refrain from exercising jurisdiction over basic rates where a franchising authority's initial certification is denied for failure to adopt regulations consistent with the Commission's rate rules. Petitioners express their concern that the Commission's present jurisdictional approach will discourage otherwise resourceful franchising authorities from adopting consistent regulations, so as to force the Commission to assume jurisdiction and allow the franchising authority to bypass the franchise fee rebuttal showing.[30]

49. We believe that our statutory obligations require us to assert jurisdiction over basic rates when a franchising authority's certification effort is denied for failure to adopt regulations that are consistent with the Commission's rate rules. We do not believe Congress intended for a franchising authority to regulate when its regulations will substantially or

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[29] The Commission retains the right to review such determinations and seek an explanation from the franchising authority concerning the factual finding underlying its decision to decertify. We will not prohibit a franchising authority from again seeking certification, even after it has decertified. However, if a pattern of repeated certification and decertification develops, we reserve the right to examine the situation to determine whether the franchising authority can justify its determinations as to the propriety of rate regulation in its community.

[30] The franchise fee rebuttal showing requires a franchising authority seeking Commission regulation of basic rates to rebut a presumption that its franchise fees provide the franchising authority sufficient financial resources to regulate. See discussion at para. 42, *supra*. See also 47 C.F.R. § 76.913.

materially conflict with federal regulations.[31] Nor do we believe Congress intended that there be a regulatory vacuum when a franchising authority has affirmatively sought certification. Once a franchising authority has affirmatively sought certification because it believes basic rates to be unreasonable, and has indicated a willingness to regulate, we will step in to ensure that basic service rates are properly scrutinized until the franchising authority can become certified.

50. With respect to petitioners' argument that franchising authorities may use our jurisdictional scheme to evade the franchise fee rebuttal showing, we emphasize that our assumption of jurisdiction in such cases is meant to serve only as an interim solution, where possible, until the franchising authority can conform its regulations or overcome its legal impediment to satisfy federal regulations and become certified. We will therefore monitor such cases carefully and will expect franchising authorities to act in good faith to meet their certification obligations. Therefore, we reserve the right to treat a franchising authority's continued failure to meet certification requirements as if it were directly asking us to regulate. Regulation by us would, of course, be subject to the franchise fee rebuttal showing. See paras. 39-43, *supra*.

51. Revocation of Certification. The 1992 Cable Act establishes conditions for the denial or revocation of a franchising authority's certification. As a threshold matter, a franchising authority that seeks to exercise regulatory jurisdiction must meet certain statutory requirements; otherwise the Commission can deny its request for initial certification.[32] If, after a franchising authority has been certified, the Commission finds that the franchising authority has acted inconsistently with the statutory requirements, "appropriate relief" may be granted. However, if the Commission determines, after the franchising authority has had a reasonable opportunity to comment, that the state and local laws and regulations are not in conformance with the regulations prescribed by the Commission to regulate rates, then the Commission must revoke the jurisdiction of the authority. 47 U.S.C. § 543(a)(5).

52. In the Rate Order, we viewed the foregoing provisions as granting the Commission a degree of flexibility in revoking franchising authority certifications. Thus, we decided that if a franchising authority's actions are inconsistent with the statutory conditions for

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[31] Indeed, in revocation cases where the Commission determines that a franchising authority's laws and regulations are not in conformance with Commission regulations, the statute instructs the Commission to assume jurisdiction directly. See Communications Act, § 623(a)(5), 47 U.S.C. § 543(a)(5). See also discussion at paras. 51-57, *infra*, concerning ability to cure minor rule conflicts in revocation cases.

[32] There are three statutory requirements. First, the franchising authority must adopt and administer rate regulations that are consistent with those of the Commission. Second, the franchising authority must have the legal authority and personnel to implement the necessary regulations. Third, the franchising authority's procedural regulations for rate proceedings must provide interested parties with a reasonable opportunity to comment. See Communications Act, § 623(a)(3)(A)-(C), 47 U.S.C. § 543(a)(3)(A)-(C). See also Communications Act, § 623(a)(4)(A)-(C), 47 U.S.C. § 543 (a)(4)(A)-(C) (setting forth that failure to meet three factors is cause for certification disapproval).

certification, we would issue a remand order directing the franchising authority to correct its defects before revoking certification and exercising jurisdiction. We observed that providing authorities with an opportunity to cure is supported by the language in the Act that calls for the granting of "appropriate relief" in such cases. Rate Order, *supra* at 5699.

53. By contrast, the Rate Order also indicated that we would directly revoke the certification of a franchising authority if we found, after an opportunity for comment, that state and local laws and regulations do not conform to our rate regulations. We indicated that we took the directive of Section 623(a)(5), 47 U.S.C. 543(a)(5) -- that the Commission "shall revoke" certification if "state or local laws and regulations are not in conformance" with our rate regulations -- to apply to local and state rules that on their face conflict with ours, and which have been interpreted by state and local authorities to so conflict. We indicated that we would assume jurisdiction in such cases only until the authority could become recertified. Id.

54. NATOA requests that the Commission reconsider its rules for revocation of certification and include provisions that (1) clarify that a certification will be revoked only upon a showing that any nonconformance with the Cable Act or the Commission's rules is substantial; and (2) permit a franchising authority to cure any nonconformance with the Commission's regulations. NATOA observes that the Commission's rules permit a franchising authority to cure any defects in local regulations if such regulations are inconsistent with the statutory certification requirements expressed in Section 623(a)(3) of the 1992 Cable Act, 47 U.S.C. § 543(a)(3). NATOA indicates that, by contrast, a franchising authority is not given an opportunity to cure defects when its regulations are not in conformance with the rate provisions established by the Commission pursuant to Section 623(b).[33] NATOA argues that the distinction between the two grounds for revocation serves no purpose and that providing a franchising authority an opportunity to cure any nonconformance with the Commission's rules preserves the scarce resources of both the Commission and franchising authorities. In the absence of the opportunity to cure, NATOA points out, franchising authorities will be forced to file requests for recertification, which requests must be reviewed by the Commission. Additionally, NATOA contends that the Commission would preserve scarce resources if we revoke certifications only upon a finding that the nonconformance or inconsistency is substantial and material.

55. In response to NATOA's concerns, we will modify our position on Commission assumption of jurisdiction in revocation cases involving nonconformance with Commission regulations. As a general matter, we will allow a franchising authority to cure any nonconformance with our rules that does not involve a substantial or material regulatory conflict before we will revoke its certification and assume jurisdiction. On the other hand, we believe that the statute compels us to revoke the certification of any franchising authority once we find, after there has been an opportunity to comment, that state and local regulations conflict with our regulations in a substantial and material manner. More specifically, we will revoke the jurisdiction of a franchising authority for nonconformance when the state and

[33] Compare 47 C.F.R. § 76.914(a)(1) with 47 C.F.R. § 76.914(a)(2).

local laws involve a substantial and material conflict with our rate regulations.

56. A twofold jurisdictional approach, one that allows franchising authorities to retain jurisdiction when there is a minor rule conflict but empowers the Commission to assume jurisdiction when there is a major rule conflict, makes good regulatory sense. In particular, we agree with NATOA that it preserves the scarce resources of the Commission and the franchising authorities to revoke only those certifications in nonconformance cases involving a substantial or material regulatory conflict. Otherwise, in every case of nonconformance, regardless of how insignificant the rule conflict, we would be revoking certifications and forcing franchising authorities to file petitions for recertification. The Commission would bear the additional burden in such cases of assuming regulatory authority over basic cable rates and reviewing the recertification requests of the local authorities. We conclude there is no good reason for such requirements when a franchising authority that has been proceeding under Commission-certified regulatory authority can easily "cure" a rule conflict.

57. We believe the statute provides us with the flexibility to undertake this approach. The Act's provision for "appropriate relief" in Section 623(a)(5), 47 U.S.C. 543(a)(5), permits us to establish a procedure by which franchising authorities can "cure" certification inconsistencies -- even those involving minor regulatory conflict. Rate Order, *supra* at 5699. We believe that it is reasonable to interpret Section 623(a)(5)'s concomitant requirement, that the Commission revoke the jurisdiction of a franchising authority administering nonconforming state and local laws and regulations, to apply to cases involving only substantial or material regulatory conflict, as described above.

B. Franchising Authority's Basic Rate Decision.

58. Cost-of-Service Showings for Basic Tier Rates. Some local franchising authorities may have resources and personnel sufficient to conduct a review of a rate-setting justification based on an FCC Form 393 (and/or FCC Forms 1200/1205), but not to examine and review a cost-based showing. This concern may have discouraged certification by many local franchising authorities. We believe that the Commission, consistent with the statutorily shared jurisdictional framework for regulation of the basic service tier, should provide assistance to certified local franchising authorities that are unable to conduct cost-based proceedings. Accordingly, on our own motion, we have decided to establish procedures under which the Commission, if requested by the local franchising authority in a petition for special relief under Section 76.7 of the Commission's rules, will issue a ruling that makes cost determinations for the basic service tier. The ruling will also set an appropriate cost-based rate, and will become binding on the local franchising authority and the cable operator. Specifically, local franchising authorities receiving cost-of-service showings from cable operators seeking to justify either initial rates or rate increases for the basic service tier will be able to obtain such a Commission ruling on their behalf for those submissions pending no more than 30 days before May 15, 1994, or those made on or after that date.

59. Under these procedures, upon receipt of a cost-of-service showing, a local

franchising authority will have 30 days to decide whether to seek Commission assistance.[34] If the franchising authority decides to seek Commission assistance, the franchising authority must issue a brief order to that effect, and serve a copy (before the 30-day deadline) on the cable operator submitting the cost showing. In its request for Commission assistance, the local franchising authority must explain its reasons for seeking Commission assistance, such as lack of adequately trained personnel, lack of financial resources, or other exigent circumstances. Upon receipt of the local authority's notice to seek Commission assistance, the cable operator must deliver a copy of the cost showing together with all relevant attachments to the Commission within 15 days.[35]

60. The Commission's determination of cost-based rates for the basic service tier will be governed by Section 76.945 of the Commission's rules, and will become binding upon the local franchising authority. The Commission will notify the local franchising authority and the cable operator of its determination and the basic service tier rate, as established by the Commission. The rate will take effect upon implementation by the local franchising authority and the appropriate remedy, if applicable will be determined by the franchising authority. A cable operator or franchising authority may seek reconsideration by Commission staff, or review by the full Commission, of the staff ruling on the cost-based determination or the rate itself, pursuant to Section 1.106 or Section 1.115 of the Commission's rules.

61. We believe that this procedure will not present significant burdens to the Commission. Pursuant to our rate regulations, operators facing regulation of both the basic and cable programming services tiers already are required to select the same method of initial regulation for both tiers.[36] Thus, for example, if a cable operator, in response to a subscriber complaint, chooses to justify cable programming service rates with a cost showing to the Commission, the operator is required to submit a cost-of-service showing to the local franchising authority in response to an initial notice of regulation concerning basic service received within one year of the initial date of regulation of the cable programming services tier. Therefore, in many cases, the Commission will simply conduct parallel cost determinations for both tiers of service rather than only for the cable programming service tier, thereby creating efficiencies by eliminating duplicative analyses. Further, this approach

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[34] Under the Commission's current rules, if a franchising authority is able to determine that a cable operator's current rates for the basic service tier and accompanying equipment are reasonable under the Commission's rate regulations, the rates will go into effect 30 days after they are submitted. If the franchising authority is unable to determine the reasonableness of the rates within this period, and the operator has submitted a cost-of-service showing, the franchising authority may toll the effective date of the rates in question for an additional 150 days to evaluate the cost showing. See Rate Order at 5709; 47 C.F.R. § 76.930.

[35] We will classify referrals of cost-of-service cases from local franchising authorities as restricted proceedings for purposes of our *ex parte* rules. Accordingly, *ex parte* presentations are prohibited. See 47 C.F.R. § 1.1208 (1992).

[36] See Third Report and Order in MM Docket No. 92-266, 8 FCC Rcd 8444 (1993).

will permit many local authorities to focus their resources on administering and enforcing the cost-based rate established by the Commission, rather than on reviewing the operator's cost showing. This, in turn, should increase incentives for local franchising authorities to certify and regulate basic cable service. Thus, we believe this approach will benefit consumers.

62. Delegation of Authority and Form of Decision. King County asks the Commission to clarify that the authority to make rate decisions and to issue written orders may be delegated to specified governmental agents such as a local cable commission. In the Rate Order, we noted that a state, while remaining the franchising authority, may delegate its rate regulating power to localities if the state's statutory scheme permits it. Rate Order, *supra* at 5685. Similarly, we find that the 1992 Cable Act does not prohibit franchising authorities, if so authorized by state and/or local law, from delegating their rate-making responsibilities to a local commission or other subordinate entity, even if that entity is not the "franchising authority" entitled to certification under the Act.[37] Any such subordinate entity will be acting as the authorized agent of and at the will and pleasure of the franchising authority, and its actions will be subject to at least the implicit, if not explicit, ratification of the full franchising authority. We believe that because of the many demands placed on municipalities and other entities that serve as franchising authorities, such flexibility is necessary to better enable franchising authorities to implement and enforce the Commission's regulations within the time frames specified in our procedural rules.

63. These petitioners also request that the Commission clarify that rate decisions need not be issued by resolution or ordinance, but may be made by letter or any other form, as long as they meet the public notice requirements. In the Rate Order, we required that a franchising authority issue a written decision to the public and give public notice of such decision whenever it disapproves, in whole or in part, either initial rates or an increase in rates or when it approves a proposed rate over the objections of interested parties. Id. at 5715, 16. Provided that issuance of the decision satisfies the Rate Order's public notice requirements, franchising authorities, or the state or local governments, may determine the particular form such rate decisions will take.

64. Due Process Concerns. In the Rate Order, we afforded franchising authorities considerable flexibility regarding the manner in which interested parties may participate in proceedings regarding rates for the basic service tier and accompanying equipment, as long as they provide a reasonable opportunity for consideration of the views of interested parties and act within the prescribed time periods. Rate Order, *supra,* at 5716. We also gave franchising authorities the flexibility to decide whether and when to conduct formal or informal hearings, as long as they act on rate cases within the prescribed time periods to provide interested parties with notice and a meaningful opportunity to participate. Id.

65. Colony Communications and Viacom take exception to our provision of flexibility regarding rate hearings. They request that we clarify that due process concerns may require

[37] Section 602(10) of the Communications Act defines franchising authority as any governmental entity empowered by Federal, State, or local law to grant a franchise. 47 U.S.C. § 522(10).

a formal hearing under certain circumstances. Specifically, petitioners argue that informal procedures, while reducing administrative burdens on franchising authorities and cable operators, may not be sufficient to protect cable operators' rights under the Due Process Clauses of the Fifth and Fourteenth Amendments, particularly where there are material issues of fact in dispute. Thus, petitioners suggest, in cases where material issues are in dispute and the cable operator has requested a formal hearing and has submitted a reasoned analysis to support its request, the franchising authority must convene a formal hearing.

66. Our determination in the Rate Order that franchising authorities may decide whether and when formal hearings are necessary is not inconsistent with petitioners' contentions. This determination will rest largely upon whether the particular rate issue presents a material issue of fact that can be resolved only through an adjudicative trial-type hearing. See K. Davis, Administrative Law Treatise §§ 12:1; Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987); Connecticut Office of Consumer Council v. FCC, 915 F.2d 15 (2d Cir. 1990), cert. denied, 111 S. Ct. 1310 (1991). Rather than impose specific procedural requirements on each individual franchising authority, we find it more appropriate at this juncture to remind franchising authorities to examine their current procedural requirements for other local proceedings and determine the best forum for providing due process to cable operators. In any event, a cable operator is not without redress if it determines that the franchising authority has denied the operator its due process rights. Pursuant to Section 76.944 of the Commission's Rules, the cable operator may raise that argument in its appeal to the local courts of the franchising authority's written decision. 47 C.F.R. § 76.944; Rate Order, *supra* at 5729, n. 388.

67. Appeals. We stated in the Rate Order that cable operators must file appeals of local rate decisions with the Commission within 30 days of release of the text of the franchising authority's decision. Id. at 5730, 31; 47 C.F.R. § 74.944(b). Oppositions may be filed within 15 days after the appeal is filed, and must be served on the party or parties appealing the rate decision. Replies may be filed seven days after the last day for oppositions and must be served on the parties to the proceeding. 47 C.F.R. § 76.944(b).

68. NATOA requests that the Commission add a provision requiring parties filing appeals with the Commission to serve a copy of the appeal on the franchising authority or the delegated authority that issued the basic rate decision. NATOA contends that such a requirement is consistent with other provisions in the Commission's Rules, such as Section 76.914. This request is unopposed.

69. We will amend Section 76.944(b) to require any party filing an appeal of a local rate decision to serve a copy of the appeal on the appropriate decisionmaking authority. Additionally, where the state is the appropriate decisionmaking authority, the state must forward a copy of the appeal to the appropriate local official(s). This requirement would serve Congress's mandate in Section 623(b)(5)(B) of the Communications Act, 47 U.S.C. 543(b)(5)(B), that the Commission establish procedures for the expeditious resolution of disputes between cable operators and franchising authorities, and would not impede the filing